Supreme Court, U. S.
FILED
OCT 11 1950
CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

NO. 351

PITTSBURGH TERMINAL REALIZATION CORPORATION, Petitioner,

v.

WILLIAM G. HEENER, Trustee of Pittsburgh Terminal Coal Corporation, Debtor, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILLIAM G. HEINER, Trustee of Pittsburgh Terminal Coal Corporation, Debtor, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Pittsburgh Terminal Realization Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case, there entitled *In the Matter of Pittsburgh Terminal Coal Corporation,* on July 17, 1950.

OPINIONS BELOW.

No opinion was filed by the District Court. The opinion of the Court of Appeals (R. 65-70) is reported in 183 F. 2d 520.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 17, 1950 (R. 63). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Sec. 1254.

QUESTION PRESENTED.

Whether a federal bankruptcy court, in a corporate reorganization proceeding, has jurisdiction, after confirmation and consummation of the plan of reorganization, to intervene in the internal affairs of the successor corporation by enjoining a meeting of its shareholders.

STATUTE INVOLVED.

Bankruptcy Act, Chapter X, 52 Stat. 883, 11 U.S.C. Sec. 501 *et seq.* (Chandler Act).[1]

STATEMENT.

On November 2, 1949, the board of directors of Pittsburgh Terminal Realization Corporation, a Pennsylvania business corporation incorporated in 1944, adopted a resolution proposing certain amendments (Appt. 32a)[2] to the by-laws of the corporation and calling a special meeting of its shareholders, to be held on

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1. The opinion of the Court of Appeals (R. 65-70), which holds that Chapter X confers jurisdiction upon the reorganization court, does not refer to any specific section of the chapter.

2. The appendixes to the briefs of the appellant and appellee in the court below are designated as "Appt." and "Appee.", respectively.

December 12, 1949, for voting upon the question of adopting the proposed amendments. Notice of the special meeting (Appt. 31a) setting forth the proposed amendments in full was duly sent to all shareholders of record.[3]

On December 7, 1949, William G. Heiner, as trustee of Pittsburgh Terminal Coal Corporation, a then non-existent[4] corporation which had been the debtor in a corporate reorganization proceeding from which Pittsburgh Terminal Realization Corporation emerged as the successor corporation under the consummated plan of reorganization, presented a petition (Appt. 37a-47a) to the federal bankruptcy court averring that the adoption of the proposed amendments by the shareholders of the Realization Corporation without the consent and approval of the federal court would be unlawful, and praying for an order enjoining the shareholders meeting of

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3. As indicated in the explanatory letter (Appt. 33a-36a) accompanying the notice, the purpose of the proposed amendment extending the duration of the corporation's existence for a further term of five years was to permit disposal of its remaining assets by orderly liquidation with maximum realization, rather than by forced sale at sacrifice prices; and the purpose of the proposed amendment removing the limitation of $5,000 on the total compensation payable annually to all officers and directors together was to permit the payment of fair compensation in order to retain competent management for the corporation.

4. On December 7, 1949, the debtor's corporate existence had ceased five years before, all of its creditors had been paid in full, and the trustee's only unperformed duties were to file his account and to pay over to Pittsburgh Terminal Realization Corporation any remaining balance in accordance with the order of consummation entered on March 23, 1945. (Appt. 24a)

the Realization Corporation and authorizing him, Heiner, to investigate the conduct of its business and affairs.

The reorganization of the debtor, Pittsburgh Terminal Coal Corporation, had been commenced on December 4, 1939 (Appt. 1a) by a creditor's petition under Chapter X of the Bankruptcy Act. The debtor, which was placed under trusteeship by the court, had owned and operated ten coal mines in Western Pennsylvania, together with miners' villages, general stores, and retail coal yards. While litigation in behalf of the debtor's estate was pending, the trustee sold the debtor's remaining operating mine (Appt. 41a) and the bulk of its mining machinery and equipment. (Appt. 37a). There remained extensive real estate holdings. The litigation was finally settled in 1944 by an agreement that was made part of the plan of reorganiation subsequently confirmed by the court on December 19, 1944. (Appt. 1a). The plan provided for the cash payment in full of all allowed claims against the debtor, and for the exchange, for each share of preferred stock of the debtor, of a cash distribution plus one share of stock of a successor corporation, to be organized and to which the remaining assets of the debtor were to be transferred. (Appt. 5a). The plan further provided that the initial by-laws of the successor corporation should contain provisions limiting the duration of the corporation's existence and the total amount of compensation payable annually to its officers and directors, and requiring an affirmative vote of two-thirds of its shareholders for approval of amendments to its by-laws. (Appt. 14a) After the successor corporation, Pittsburgh Terminal Realization Corporation, had been duly organized under

the Pennsylvania Business Corporation Law[5] on December 28, 1944, the court, on March 23, 1945, entered an order (Appt. 19a-28a) directing that April 15, 1945 be the effective date of consummation of the plan. The order of consummation expressly approved the articles of incorporation and by-laws of the successor corporation as being in compliance with the plan,[6] and directed that any remaining balance in the hand of the trustee be paid over by him to the successor corporation.[7] Thereupon, the exchange of preferred shares of the debtor for cash plus shares of the successor corporation was made; the trustee of the debtor transferred by deed and bill of sale the remaining real and personal property of the debtor to the successor corporation; cash was set aside for the payment in full by the trustee of all allowed creditors of the debtor; and, in September, 1945, the trustee of the debtor and his counsel petitioned for and were allowed and paid their final fees and allowances to the termination of the reorganization proceeding. (Appee. 57a)

During the period of almost five years from April 15, 1945, the effective date of the consummation of the

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5. Pa. Act of May 5, 1933, P. L. 364, 15 Purdon Stat. Sec. 2852.

6. "The court is satisfied and hereby finds that the foregoing documents and instruments and the terms and provisions thereof are in substantial compliance with the terms and provisions of the Plan and are necessary and appropriate for the consummation of the Plan. The court hereby approves the forms, terms, provisions and conditions of said documents and instruments".

7. "(8) The Trustee is hereby authorized, ordered and directed to make the payments hereinabove set forth and pay all claims pursuant to the Plan and any balance remaining shall be paid over to the Reorganized Company for distribution to its stockholders." (Appt. 24a)

plan, until December 7, 1949, when Heiner presented his petition to the district court for the order appealed from, Pittsburgh Terminal Realization Corporation had been (and still is) conducting its affairs[8] in accordance with law and in accordance with its charter and by-laws as initially approved by the court,[9] and had been (and still is) completely solvent and able to meet its debts as they mature.[10]

On December 7, 1949, the same day that Heiner presented his petition for the order appealed from, the Securities and Exchage Commission, a party to the reorganization proceeding under section 208 of the Bankruptcy Act, presented a petition (Appee. 27a-41a) to the reorganization court for an order authorizing an investigation of alleged trading activities in the shares of the debtor by members of a so-called "group" associated with Alexander Guttmann, president of the Realization Corporation and formerly chairman of a stockholders committee in the reorganization of the debtor.[11]

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8. Annual meetings of its shareholders were held, at which members of the board of directors were elected, and annual reports, including complete financial statements and audits by independent certified public accountants, were submitted to its shareholders.

9. See footnote 6, *supra*.

10. On December 7, 1949, when Heiner's petition was filed, Pittsburgh Terminal Realization Corporation had assets of $441,000, of which $68,000 was in cash, against total liabilties of $25,000. (Appt. 33a)

11. Alexander Guttmann and members of his so-called "group" had filed a statement of their shareholdings under Sec. 211 on April 10, 1940, and, in December, 1944, had filed proofs of interest in connection with voting on the plan of reorganization. (Appee. 35a)

Subsequently, in its order of March 23, 1945, the

On December 9, 1949, two days after the filing of the petitions of Heiner and of the Securities and Exchange Commission,[12] and before answers[13] thereto or briefs could be prepared, Judge Burns[14] of the district court entered both orders. Pittsburgh Terminal Realization Corporation appealed to the Court of Appeals from the order entered on petition of Heiner, but no appeal has been taken from the order entered on petition of the Securities and Exchange Commission.

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court expressly approved the election of Alexander Guttmann and two other members of his "group" as the initial officers of the Realization Corporation as follows:

"5. The selection of the initial Board of Directors of the Reorganized Company heretofore approved by the Court, of the following to the offices opposite their respective names, is hereby approved by the Court:

President:	Alexander Guttmann
Vice Pres.:	J. Louis Geller
Secretary & Treasurer:	Arthur H. Bainton."

(Appt. 21a)

12. No notice of the petitions was given to Pittsburgh Terminal Realization Corporation, either by Heiner or by the Securities and Exchange Commission, until after they were presented and filed in court on December 7, 1949.

13. The charges and insinuations of misconduct made against the management of the Realization Corporation were completely unfounded, as is evidenced by the failure of a single shareholder to join in Heiner's action at the time it was brought or in the ten months since, and by the re-election to office of the same management by vote of over 90% of the outstanding shares at the annual shareholders meeting in May, 1950.

14. The entire reorganization proceeding, from its initiation in 1939 to its consummation in 1945, had been conducted by the late Judge Gibson, who retired in January, 1949.

The court below affirmed the order of the district court, holding that the bankruptcy court, despite confirmation and consummation of the plan of reorganization, retained jurisdiction over the internal affairs of the successor corporation by reason of the fact that no final decree had been entered in the proceeding for the reorganization of the debtor.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the federal bankruptcy court had jurisdiction over the internal affairs of the successor corporation after confirmation and consummation of the plan of reorganization.

2. In failing to hold that confirmation and consummation of the plan of reorganization terminated jurisdiction of the bankruptcy court over the internal affairs of the successor corporation.

3. In affirming the order of the district court.[15]

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15. If certiorari is granted, it will also be urged that the court below erred in holding that the trustee of the debtor had a right or duty to supervise the affairs of the successor corporation, and in holding that approval of the bankruptcy court was necessary to the adoption of the proposed amendments by the shareholders of the successor corporation.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below is in direct conflict with the decision of the Court of Appeals for the First Circuit in *Town of Agawam v. Connors,* 159 F. 2d 360, cert. den. 330 U.S. 845, and with the decision of the Court of Appeals for the Second Circuit in *Reese v. Beacon Hotel Corp.,* 149 F. 2d 610.

The court below rested its decision of the question of jurisdiction of the bankruptcy court over the successor corporation upon the absence of a final decree, saying, in its opinion by Judge McLaughlin (R. 67):

> "The law unquestionably is that the retention by the bankruptcy court of jurisdiction over the reorganized debtor, or, as in this instance, its successor corporation, depends upon the particular facts. In the case before us the trustee has not filed his final account *and no final decree has been entered.* (Emphasis added)

In the *Agawam* case, the same question—whether the bankruptcy court retained jurisdiction because of the absence of a final decree—was decided oppositely to the decision of the court below by the First Circuit Court of Appeals. In that case, after consummation of the plan of reorganization, but before a final decree had been entered, the federal bankruptcy court refused for lack of jurisdiction to enjoin the foreclosure by a Massachusetts Land Court of the reorganized corporation's principal asset for local real estate tax claims. In affirming, the First Circuit Court of Appeals, speaking through Chief Judge Mahoney, stated the question and its decision as follows (p. 363):

"Our question, therefore, is whether or not the jurisdiction of the Bankruptcy Court in the reorganization proceedings terminated *inasmuch as no final decree was ever entered.* If they had not terminated, serious doubt would exist as to the ability of the Land Court to assume jurisdiction over property under the jurisdiction and control of the Federal Court in reorganization proceedings. We conclude from an appraisal of the authorities cited to us that termination of jurisdiction in such a case need not await the entry of a final decree and that *confirmation and consummation of the plan of reorganization suffice to effect a release of the reorganized corporation's property from the jurisdiction of the Bankruptcy Court*". (Emphasis added)

The First Circuit holding in the *Agawam* case, that the bankruptcy court lacked jurisdiction, was made on authority of the decision of the Second Circuit Court of Appeals in *Reese v. Beacon Hotel Corp.*, 149 F. 2d 610.

In the *Reese* case, the bankruptcy court had inserted a clause in its order of confirmation expressly reserving jurisdiction to approve any leases made by the successor corporation of a theater that had been the principal asset of the debtor and that had been transferred to the successor corporation under the plan of reorganization. Pursuant to this reserved jurisdiction, the bankruptcy court had, on petition of the successor corporation and over objections of a former stockholder of the debtor, entered an order approving a lease of the theater. This order was reversed by the Second Circuit Court of Appeals for lack of jurisdiction of the bankruptcy court over the affairs of the successor corporation, notwithstanding the fact that the disposition of

the theater had been the primary purpose of the plan of reorganization and notwithstanding the clause reserving jurisdiction. In the opinion of the court, by Judge Augustus N. Hand, (p. 611):

> "We shall not discuss the merits of the lease or the technical objections which are raised, such as lack of notice to the security holders or the summary character of the proceeding, *for it is plain that the court was without jurisdiction to approve or disapprove the proposed lease under the reservation of power in the order of February 4, 1938.* We have repeatedly held that reservation of jurisdiction beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court. *Towers Hotel Corporation v. Lafayette National Bank,* 2 Cir., 148 F. 2d 145; *North American Car Corporation v. Peerless W. & V. Mach. Corporation,* 2 Cir., 143 F. 2d 938; *In re Flatbush Ave.—Nevins St. Corporation,* 2 Cir., 133 F. 2d 760; *Bakers Share Corporation v. London Terrace,* 130 F. 2d 157; *In re Ambassador,* 2 Cir., 124 F. 2d 435." (Emphasis added)[16]

In view of the conflict between the decisions of the First and Second Circuits on one hand and the decision of the Third Circuit in the case at bar on the other hand, a settlement of the dispute by the Supreme Court appears to be necessary.

2. The question of when the bankruptcy court ceases to have jurisdiction over the reorganized or suc-

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16. In the case at bar, the bankruptcy court had not even attempted in any prior order to reserve jurisdiction to approve future amendments to the by-laws of the successor corporation.

cessor corporation is of fundamental importance, and its determination is vital to the proper administration of corporate reorganizations under the Bankruptcy Act.

Every successful corporate reorganization necessarily results in a reorganized or successor corporation, and, therefore, every such reorganization necessarily carries with it the question of when the jurisdiction of the bankruptcy court over the reorganized or successor corporation ceases. It is also of paramount importance to the shareholders of every solvent reorganized corporation to know whether their power to amend by-laws and otherwise control the destinies of their corporation is subject to the approval of the federal court which supervised the reorganization proceeding.

3. The decision of the court below sustaining the jurisdiction of the bankruptcy court is based upon a construction of the Bankruptcy Act that is erroneous and violative of the Tenth Amendment to the Constitution.

A district court sitting in a reorganization proceeding is a court of bankruptcy, and, as such, possesses only the jurisdiction and powers that are accorded it by statute. *Matter of The Prima Co.* (C.A. 7, 1938) 98 F. 2d 952, cert. den. *sub nom. Keig v. Harris Trust & Savings Bank,* 305 U.S. 658. The principles governing the bankruptcy jurisdiction of federal courts were summarized as follows in *Town of Agawam v. Connors,* 159 F. 2d 360, cert. den. 330 U.S. 845, (p. 363):

> "The Constitution (Art. 1, Sec. 8, cl. 4) does vest Congress with paramount authority to make uniform laws concerning bankruptcies. When Con-

gress enacts a bankruptcy act that law is therefore supreme and, when the courts exercise jurisdiction conferred upon them by such a statute, they are exercising a paramount and exclusive jurisdiction. *But it is necessary that the jurisdiction so exercised be one within the powers conferred upon the courts and within the terms of the statute.*" (Emphasis added)

Chapter X grants to the reorganization court broad and comprehensive jurisdiction over the *debtor* and its property. But the jurisdiction granted over the successor corporation is not coextensive with the jurisdiction granted over the debtor,[17] as erroneously assumed by the court below. Chapter X's express definition of the term "debtor"[18] clearly does not include the successor corporation, and the term "debtor" is used in contradistinction to the successor corporation throughout the chapter.[19]

The construction of the Bankruptcy Act inherent in the decision of the court below—that a federal bankruptcy court has jurisdiction over the internal affairs

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17. Cf. *Prudence Realization Corp. v. Ferris,* 323 U.S. 650, 655: "Despite the fact that neither the bankruptcy court nor the reorganization statute professes to alter rights unless disclosed in the plan or in an order, we are asked to recognize some enveloping cloud of amenability to the law governing bankruptcy proceedings."

18. Sec. 106 (5): " 'debtor' shall mean a corporation by or against which a petition has been filed under this chapter;"

19. See Secs. 216, 221, 224, 226.

of a state corporation that is completely solvent and able to meet its debts as they mature[20]—is violative of the Tenth Amendment as an infringement of state sovereignty. It is well settled that the federal bankruptcy jurisdiction, though extremely broad, is not unlimited. As stated by Mr. Justice Sutherland in *Continental Illinois National Bank & Trust Co. v. Chicago R. I. & P. Ry. Co.*, 294 U.S. 648, 669,

> "But while it is true that the power of Congress under the bankruptcy clause is not to be limited by the English or Colonial law in force when the Constitution was adopted, it does not follow that the power has no limitations."

Congress, in enacting Chapter X, was cognizant of the constitutional limitation, and was careful not to infringe on state jurisdiction over the successor corporation. A clause conferring on the successor corporation "full power and authority to put into effect and carry out the plan" was not incorporated in Chapter X because it was felt that this provision "might be construed to confer such power, regardless of the limitations of a state corporation law." Analysis of H. R. 12889, 74th Cong. 2d Sess. (1936) 80.

That the successor corporation in conducting its affairs is subject to state law and not to federal court

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20. The Supreme Court has on several occasions approved a definition of the subject of bankruptcies as being nothing less than "the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief." *Hanover Bank v. Moyses*, 186 U.S. 181; *Continental Illinois Bank & Trust Co. v. Chicago R. I. & P. Ry. Co.*, 294 U.S. 648, 672; *United States v. Bekins*, 304 U.S. 27, 47.

supervision was expressly declared in *In re Ambassador Hotel Corp.*, 124 F. 2d 435 (2 Cir. 1942), where the court said:

> "In selecting such a [state] corporation as an instrumentality of reorganization, the bankruptcy court sent it out into the state as fully subject to state law as though the court had had nothing to do with its creation."

And in *Bakers Share Corp. v. London Terrace, Inc.*, 130 F. 2d 157, (2 Cir. 1943), the court declared that a federal reorganization court

> "is not obliged to use a state corporation as its instrument at all; it may leave the debtor in possession of its property; but if it does choose to use one, it must take it with such powers as the state law sees fit to give it."

In the case at bar, the district court chose a Pennsylvania corporation as its instrument of reorganization. The laws of Pennsylvania give to every corporation organized thereunder the power to make and amend by-laws.[21]

The decision of the district court, affirmed by the court below, sustaining the contention in Heiner's petition that the by-laws of the successor corporation can-

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21. The Pennsylvania Business Corporation Law, Act of May 5, 1933, P. L. 364, 15 Purdon Stat. Sec. 2852, provides as follows:

> "Sec. 302. Subject to the limitations and restrictions contained in this act or in its articles, every business corporation shall have power: * * * (11) to make, alter, amend, and repeal by-laws, not inconsistent with its articles or with law, for the administration and regulation of the affairs of the corporation."

not "be lawfully changed by mere amendment approved by the stockholders and without the consent and approval of your Honorable Court" (Appt. 43a) means that the federal court has created in Pittsburgh Terminal Realization Corporation a new and peculiar species of corporation heretofore unknown in law, *i.e.*, a corporation whose stockholders must have the consent and approval of a federal court before they may vote on proposed amendments to their by-laws.[22]

That Chapter X intends the shareholders of the successor corporation to be free of supervision by the bankruptcy court was pointed out in *Knight v. Wertheim,* 158 F. 2d 838 (2 Cir. 1946), where the circuit court, in reversing the bankruptcy court's refusal to submit a proposed alteration of the plan to the shareholders after confirmation but before consummation, said (Judge Learned Hand) (p. 844):

> "It was for a majority of the shareholders, and for them alone, to decide whether they preferred to accept the chance of being able to pay the interest on the first mortgage; and if they chose to do so, the judge would not have been justified in interfering in their choice; it was a practical decision within the powers of the majority. Chapter X does not give to the bankruptcy court any larger supervision in such a situation than if the new company had been set up and sent on its way."

Aside from the fact that the charges of misconduct made against the management of the successor corpora-

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22. Proxies were returned by 91% of the outstanding shares of Pittsburgh Terminal Realization Corporation favoring the adoption of the enjoined amendments, and by none opposing.

tion are completely unfounded,[23] and aside from the elementary principle that the need for remedying a wrong does not of itself create jurisdiction in a court, there was not even an apparent need for exercise of jurisdiction by the federal bankruptcy court. Even if the charges had been well founded, the apparently non-existent "minority" shareholders of the Realization Corporation, in whose behalf Heiner purports to act, could, being *sui juris*, have sought relief without his unsolicited intervention. And, without recourse to the bankruptcy court, full and complete relief would have been available to them under Pennsylvania law by shareholders' suit in equity,[24] by *quo warranto* to test the right of any officer or director to hold his office,[25] and by *mandamus* to enforce the right to inspect the corporation's books.[26]

The decision of the court below is believed to be erroneous for the further reason that the adoption of the proposed amendments by the shareholders of the successor corporation was entirely proper and lawful. It has not been, and could not be, contended by the respondent that the proposed amendments or the procedure for their adoption violated any provision of the by-laws of the corporation as expressly approved by the reorganization court's order of consummation

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23. See footnote 13, *supra*.

24. *Malone v. Lancaster, Gas, Light & Fuel Co.*, 182 Pa. 309, 37 A. 932.

25. Pa. Act of June 14, 1836, P. L. 621, 12 Purdon Stat. Sec. 2022; *Deal v. Miller*, 245 Pa. 1, 90 A. 1070.

26. Pa. Act of June 8, 1893, P. L. 345, 12 Purdon Stat. Sec. 1913; *Taylor v. Eden Cemetery Co.*, 337 Pa. 203, 10 A. 2d 573.

(Appt. 20a) as being in compliance with the plan.[27] That order is *res judicata, Chicot Co. Dist. v. Baxter State Bank,* 308 U.S. 371, 378, *Prudence Realization Corp. v. Ferris,* 323 U.S. 650, 655, and can not be collaterally attacked in an action to enjoin the corporation from proceeding in accordance with its by-laws as therein approved.

The decision of the court below is believed to be erroneous for the still further reason that the trustee had no power or authority to present his petition for the order appealed from. *Reese v. Beacon Hotel Corp.,* 149 F. 2d 610. Even as trustee of the debtor, he was *functus officio.*[28] Clearly, Chapter X, which provides for the creation of the successor corporation upon consummation of the plan, and for the discharge of the trustee[29] upon consummation of the plan, does not con-

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27. The plan of reorganization provides as follows (Art. V):

"The Articles of Incorporation or By-Laws of the Reorganized Company, as is appropriate, shall provide that * * * (e) amendment of by-laws and amendment of the articles of incorporation shall each require the affirmative vote of the holders of at least two-thirds of the outstanding shares * * *" (Appt. 15a)

28. There were neither creditors nor shareholders of the debtor, and its corporate existence had ceased more than five years before.

29. "Sec. 228. Upon the consummation of the plan, the judge shall enter a final decree * * * (2) discharging the trustee, if any."

Upon the failure of the trustee to petition for the entry of a final decree, it would have been proper for the reorganization court to enter a final decree *sua sponte. In re Elless Co.,* 174 F. 2d 925, cert. den. *sub nom. Blair v. Finan,* 338 U.S. 824.

template supervision of the successor corporation by the trustee.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

October 9, 1950.

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In the Supreme Court of the United States

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No. 351

PITTSBURGH TERMINAL REALIZATION CORPORATION, PETITIONER

v.

WILLIAM G. HEINER, TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINION BELOW

No opinion was filed by the District Court. The opinion of the Court of Appeals (Appee. 65-70)[1] is reported in 183 F. 2d 520.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1950 (Appee. 63). Petitioner in-

[1] The record herein consists of the appendices to the briefs of the appellant and appellee in the Court of Appeals, which are designated as "Appt." and "Appee.", respectively.

vokes the jurisdiction of this Court under 28 U. S. C. 1254.

QUESTION PRESENTED

Where, pursuant to a plan of reorganization in a Chapter X proceeding, a corporation has been formed for the express purpose of liquidating the remaining assets of the debtor, may the reorganization court, when facts are brought to its attention which indicate that the terms of the decree and of the plan are being violated and circumvented, issue an order for a limited investigation, and for a preliminary injunction which does no more than maintain the status quo pending the investigation?

STATUTE INVOLVED

Relevant portions of Chapter X of the Bankruptcy Act, 52 Stat. 840, 883, 11 U. S. C. 501 *et seq.* are printed in the Appendix hereto.

STATEMENT

The judgment of the Court of Appeals of which review is sought affirmed an order of the district court in proceedings for the reorganization of Pittsburgh Terminal Coal Corporation under Chapter X of the Bankruptcy Act.[2] This order (Appt. 48a-49a) (1) preliminarily enjoined, pending final hearing, proposed action of the petitioner, Pittsburgh Terminal Realization Corporation ("Realization Corporation"), the debtor's successor, at a stockholders' meeting called for the pur-

[2] Pursuant to Section 208 of the Bankruptcy Act (11 U.S.C. 608) the Securities and Exchange Commission has been a party to the reorganization proceeding of the debtor.

pose of removing certain protective safeguards contained in the plan of reorganization and in the corporation's by-laws, and (2) authorized and directed the Chapter X trustee to conduct an investigation of the Realization Corporation "for the purpose of determining whether or not said corporation has been conducted in conformity with the terms, provisions, intent and purpose of the plan of reorganization * * *."

The debtor had been engaged in coal mining prior to the institution of the Chapter X proceeding. At that time the coal mines of the debtor were nearing exhaustion, and mining operations were discontinued entirely in 1940.[3] As an alternative preferable to a bankruptcy liquidation, the trustee proposed a plan providing for the orderly liquidation of the debtor's assets through the vehicle of a liquidating corporation.

Certain restrictions to be incorporated in the articles of incorporation or by-laws of the company to be organized were specifically set forth in the plan. These included provisions limiting the purpose of the successor corporation to "liquidating the remaining assets of the debtor" (Plan, Article V(a), Appt. 14a), limiting the term of

---

[3] At that time the debtor appeared heavily insolvent; physical assets appraised at only $1,573,103 were available to satisfy liabilities of $4,590,436 (Appee. 28a). Subsequently, the condition of the estate changed to one of solvency by reason of favorable settlement of mismanagement lawsuits which had been instituted by the trustee in 1941 (Appee. 29a-31a).

existence of the corporation to five years, which term might be extended for an additional five years (Plan, Article V(b), Appt. 14a), and limiting the total compensation to be paid to officers and directors in any capacity to $5,000 per year (Plan, Article V(i), Appt. 15a).

The plan also provided for a reservation of jurisdiction in the district court over the "Reorganized Company, its books, records and papers and over the Trustee after the final decree in the Reorganization Proceedings" (Appt. 16a), as well as over the "assets dealt with in the Plan and over all and any persons to whom such assets may be transferred * * * for the purpose of carrying out and giving effect to any and all provisions of the Plan and the decree confirming the same" (Appt. 18a).

In this form the plan was accepted by the security holders and confirmed. In its order of March 23, 1945, for consummation of the plan, the court approved the proposed certificate of incorporation and by-laws of the Realization Corporation and reserved jurisdiction *inter alia* "to make from time to time such orders appropriate for enforcing or carrying out the Plan or the provisions of this Order or any Order herein before entered herein, as the Court may at any time deem proper" and "Generally to determine any and all matters pertaining to these proceedings or the Plan or to the Reorganized Company" (Appt. 27a-28a). The petitioner corporation was then formed "for the

purpose of liquidating the remaining assets of the debtor" (Appt. 39a).

Throughout the reorganization an active participant was the Protective Committee for Preferred Stockholders whose members are Alexander Guttmann, chairman, Arthur Bainton and George Geller. Guttmann and his associates at the hearing on the plan had unsuccessfully opposed the inclusion of proposed limitations on the new corporation and had urged that it be set up as a real estate company rather than for the purpose of liquidation. From the time the Realization Corporation took over the assets of the estate in 1945, it has been dominated and controlled by the Guttmann group with Guttmann as president, and Bainton as secretary-treasurer.

The order of the district court was precipitated by an attempt of the management of the Realization Corporation to call a special meeting of stockholders to eliminate the provision of the by-laws restricting the salaries of officers, and to extend the corporate term of existence for an additional five years (Appt. 31a-32a). Upon receiving notice of this meeting, the Chapter X trustee petitioned the court to enjoin the meeting and to authorize an investigation of the Realization Corporation's affairs (Appt. 37a-47a). The petition alleged that the Guttmann management, contrary to the intent of the reorganization plan, had caused the corporation to pay large sums as salaries to their rela-

tives,[4] and that it had engaged in and contemplated engaging in "various real estate and mining operations" which indicated an attempt to continue rather than to liquidate the business (Appt. 44a).[5] It also incorporated by reference a petition of this Commission which sought authorization for an investigation into certain profits made by the Guttmann group out of trading in the debtor's securities during the course of the reorganization (Appt. 45a, Appee. 27a-44a).

After notice and hearing, the order complained of was entered whereby the court authorized the investigation by the trustee for the limited purpose set forth above (page 3), and preliminarily enjoined the stockholders' meeting except for "extending, by appropriate means, the term of existence of such corporation for one (1) year . . . pending final disposition of the trustee's peti-

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[4] Monroe Guttmann, son of Alexander Guttmann, had been paid as high as $12,000 per annum for his services as Assistant to the President. Wolfers, son-in-law of Alexander Guttmann, had also received compensation in excess of $5,000 per year—the overall compensation allowable to officers under the plan (Appt. 44a; Appee. 48a).

The corporation also financed strip mining operations by these two individuals, lending them $10,000 on an unsecured note, and an additional $5,000 when the original note was in default (Appt. 44a, Appee. 47a).

[5] Although the plan contemplated the winding up of the liquidation by December 1949, if possible, in 1946 Alexander Guttmann and certain of his associates had purchased land from the corporation on mortgages not maturing until December 21, 1951.

Among the contemplated activities were the creation of an amusement center and a new housing development (Appee. 46a-47a).

tion. . . ." (Appt. 48a-49a). This is the order of which petitioner complains.[6]

The court entered an order on the same day granting the Commission's petition to conduct an investigation into the trading activities of the Guttmann group, and no appeal has been taken therefrom.

Pursuant to subsequent investigation, it became evident that a purpose of the management in attempting to remove the restriction on compensation of officers was to make possible a bonus to Alexander Guttmann in lieu of compensation for services performed in his capacity as Chairman of the Bondholders' Committee—compensation which it was felt the court would deny him by reason of trading by his immediate family during the course of the reorganization proceedings (Appee. 59a-60a).

ARGUMENT

1. The decision of the court below turns on its own particular facts, presents no important question of federal law warranting further review, and is not in conflict with decisions of other Courts of Appeals. It merely applies to the facts of this case the established principle that a bankruptcy reorganization court has jurisdiction to protect its decrees, to interpret, enforce and carry out the

[6] At the hearing petitioner expressed no objection to the granting of an order for investigation and opposed only the issuance of the injunction (Appee. 23a, R. 69).

plan, and otherwise to prevent interference with the plan or its operation.[7]

2. The two cases relied on by petitioner to show a conflict (Pet. 9) did not involve any threat to circumvent the plan of reorganization. *Agawam* v. *Conners,* 159 F. 2d 360 (C. A. 1), certiorari denied, 330 U. S. 845, related to the foreclosure of the reorganized corporation's property for local real estate tax claims accruing subsequent to the consummation of the plan. *Reese* v. *Beacon Hotel Corporation,* 149 F. 2d 610, 611 (C. A. 2) related to a lease of theatre property owned by the reorganized corporation made "six years after the plan of reorganization went into effect," and which the court found could not in any way "be said to promote the plan or in any proper sense be ancillary to it." These cases were similar to the instant case only in that no final decree had been entered. Petitioner's attempt to predicate a conflict on that factor is in disregard of the opinion below, which states that each case must be determined "upon the particular facts" (R. 67) and proceeds to detail for several pages the facts in this case. Among these facts the court notes that no final decree had been entered. *Cf. Prudence Realization Corpora-*

[7] Cases setting forth this principle include: *In re New York, N. H. & H. R. Co.,* 169 F. 2d 337, 340 (C.A. 2), certiorari denied, 335 U.S. 867; *In re 4145 Broadway Hotel Co.,* 131 F. 2d 120, 122 (C.A. 7), certiorari denied *sub nom. Thomas* v. *Rossiter,* 318 U.S. 766; *Shores* v. *Hendy Realization Co.,* 133 F. 2d 738, 741 (C.A. 9); and *In re George F. Nord Building Corporation,* 129 F. 2d 173, 176 (C.A. 7), certiorari denied, 317 U.S. 670.

tion v. *Ferris,* 323 U. S. 650, 652, 654. It should be noted, moreover, that the court below cited and did not purport to overrule its earlier decision in *Bell* v. *Roberts,* 112 F. 2d 585 (R. 67), where a final decree had apparently not been entered and it was held that no jurisdiction existed.

3. Petitioner apparently concedes that a reorganization court has some jurisdiction over reorganized corporations (Pet. 11-12). It is apparent from petitioner's argument that it seeks to show error in the decision of the two courts below only on the factual question whether the activities enjoined and ordered investigated were of a nature which the reorganization court might enjoin. This is obviously not a certiorari question.

Concededly, after consummation of the plan the jurisdiction of the reorganization court over the reorganized corporation is not co-extensive with its jurisdiction over the debtor; and, at least in the absence of appropriate reservations of jurisdiction, the court may not interfere with normal activities of the reorganized corporation which do not impinge upon the purpose or provisions of the plan. That is substantially all that the cases cited by petitioner hold. On the other hand, as a court of equity the reorganization court has jurisdiction to make effective its decrees and, as the cases heretofore cited make clear,[8] this includes the power to prevent interference with the terms of

[8] See footnote 7, *supra,* and see Sections 115, 222, 224(2), 226 and 228 of the Bankruptcy Act.

the plan or its operations, a power which has been held to exist even after the entry of the final decree.[9]

Although a specific reservation of jurisdiction is not always determinative as to whether the reorganization court may exercise jurisdiction over the reorganized corporation, it has great importance where, as here, it is (a) contained in the plan itself and (b) the plan looks to liquidation rather than continuation of the corporation as a going concern. Such a reservation in the plan itself constitutes an assurance to security holders who vote for its approval that safeguards in the plan cannot be rendered ineffective. This is of special significance in "a plan devised to lead to an orderly liquidation as a major purpose," which, as the Court of Appeals for the Second Circuit has pointed out, "is different from a plan devised to restore a debtor to active business."[10] In the latter situation, as that court subsequently stated,[11] "it should be the objective of courts to cast off as quickly as possible all leading strings which may limit and hamper its activities and throw doubt upon its responsibility."

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[9] *Shores* v. *Hendy Realization Co.*, 133 F. 2d 738 (C.A. 9). See also 6 Collier on Bankruptcy (1947) 3932-3933, to the effect that even after entry of the final decree and without an appropriate reservation of jurisdiction, the court nevertheless has jurisdiction for the above stated purpose.

[10] *Clinton Trust Co.* v. *John H. Elliott Leather Co.*, 132 F. 2d 299, 304.

[11] *North American Car Corp.* v. *Peerless Weighing & Vending Machine Corp.*, 143 F. 2d 938, 940.

In the case of a plan devised not "to restore a debtor to an active business" but to effect a speedy liquidation and dissolution, the procedure adopted is essentially a substitute for liquidation under the Bankruptcy Act. In the absence of the safeguards provided by the Act, other safeguards, such as those involved in this case, are necessary. Otherwise, an entrenched management interested primarily in hanging on to their jobs may disregard the right of the minority to an early liquidation and prompt distribution of the proceeds, and may find it to their advantage to use the assets for speculative new ventures instead of adhering to a speedy disposal program.

In this context petitioner's argument that the safeguards contained in the reorganization plan in this case can be amended without court approval, since they were contained in by-laws which also contained an amendment procedure without reference to court approval (Pet. 15-16), is clearly without merit. In view of the provisions for amendment in the context of the plan as a whole, including the provision therein for reservation of the court's jurisdiction, it is clear that the reservation was intended to extend to the scrutiny of any amendment which might appear to be inconsistent with the basic purposes of the plan.[12] As well might

[12] Petitioner itself recognized the necessity of court approval, first by requesting the trustee to apply to the court for approval of the proposed change (Appt. 42a) and, second, by notifying the trustee of the proposed amendment on the theory, explained in the corporate minutes, that if he did not "take

the petitioner argue that the reorganization court could not prevent removal of the provision of the charter for periodic reports to security holders, a provision made mandatory by Section 216(12)(b)(2) of the Act.

4. The order of the reorganization court involves no final determination on the merits but merely authorizes an investigation of charges that the purpose of the plan it had confirmed would be circumvented by petitioner's proposed action and preserves the status quo pending the investigation. Petitioner has not attempted to show that the order could have any possible adverse effect upon it. Accordingly, if after the facts are fully developed the court should ultimately err on the question of its jurisdiction over the proposed corporate action, there would then be adequate opportunity for appellate review.

5. In any event, unless on the facts alleged the court was without any color of jurisdiction, it necessarily had jurisdiction to preserve the status quo pending investigation of the trustee's charges in order to determine whether or not it could exercise jurisdiction.[13] Accepting as true the facts as alleged, there can be no doubt that the court has jurisdiction over the proposed action of the Real-

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some action to stop the proposed change in the said by-laws; . . . it could be construed that the Court confirmed the opinion that no special hearing or ruling of the court would be needed. . . ." (Appee. 45a-46a)

[13] *Cf. Stoll* v. *Gottlieb*, 305 U.S. 165, 171; *Texas & Pacific Ry.* v. *Gulf C. & S. F. Ry.*, 270 U.S. 266, 274.

ization Corporation. The limitations on officers' salaries and on the duration of the corporation were obviously for the purpose of assuring minority stockholders that the management would carry out in a timely and inexpensive manner the purpose of the plan—an orderly liquidation of the debtor's assets. There is substantial basis for concluding that this purpose is being flouted by the present management, by payment of large salaries to their relatives and making plans to engage in speculative enterprises, and the proposed action appears as an attempt to legalize the management's improper conduct of the debtor's affairs. These facts alone would be sufficient to give the court jurisdiction for the purpose of preventing interference with the operation of the plan.

Additional charges were brought to the court's attention relating to the trading activities of the Guttmann group which, we believe, would independently justify the action of the district court. If, as charged, the management group acquired stock during the reorganization proceeding while acting in a fiduciary capacity by reason of their membership on the preferred Stockholders' Committee, under Section 212 of the Act their participation with respect to this stock should be limited to cost. This would affect the number of shares held by the management which it might vote for any amendment of the by-laws. Moreover, complete denial of the right to vote stock so acquired by fiduciaries in favor of an amend-

ment of the by-laws designed to increase their powers vis-a-vis public security holders would appear to be an appropriate sanction which the court might apply in the exercise of its equity jurisdiction. *Cf. American United Mutual Life Insurance Co.* v. *City of Avon Park,* 311 U. S. 138, 146.

That a major purpose of the action enjoined now appears to have been to evade the jurisdiction of the reorganization court over compensation for services in Chapter X proceedings [14] is a further independent ground justifying the exercise of the reorganization court's jurisdiction. In an appeal arising out of this Chapter X proceeding this Court agreed with the contention of Alexander Guttmann that fees, by whomsoever paid, for services in a Chapter X reorganization are exclusively within the jurisdiction of the reorganization court. *Leiman* v. *Guttman,* 336 U. S. 1. Clearly the reorganization court is not compelled to sit idly by while Guttmann receives compensation without its approval for his services as a member of a committee in a reorganization proceeding, particularly where the compensation would be paid from assets of the estate and where it appears that trading

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[14] This purpose was brought to light subsequent to the entry of the district court's order here involved during the course of the investigation. Affidavits reporting the facts were filed in the district court and were certified to the court below which adverted to these facts in its opinion. (R. 68-69.) We believe that such evidence may properly be considered on an appeal from an injunction order. *Cf. Landis* v. *North American Company,* 299 U.S. 248, 258.

activities in the debtor's stock would debar Guttmann from any right to compensation. See Section 249 of the Act.

CONCLUSION

There is no conflict of decisions. The decision below was correct, and there is no need for further review. The petition should be denied.

Respectfully submitted,

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NOVEMBER, 1950.

APPENDIX

BANKRUPTCY ACT, CHAPTER X, 52 Stat. 840, 883 (11 U.S.C. 601, *et seq.*):

SEC. 115. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

SEC. 167. The trustee upon his appointment and qualification—

* * * * *

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate; * * *

SEC. 208. The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding.

SEC. 212. The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor.

SEC. 216. A plan of reorganization under this chapter—

(12) shall provide for the inclusion in the charter of the debtor, or any corporation organized or to be organized for the purpose of carrying out the plan, of—

* * * * *

(b) * * * (2) in the case of a debtor whose indebtedness, liquidated as to amount and not contingent as to liability, is $250,000 or over, provisions with respect to the making, not less than once annually, of periodic reports to security holders which shall include profit and loss statements and balance sheets prepared in accordance with sound business and accounting practice.

SEC. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation

if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 224. Upon confirmation of a plan—

* * * * *

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations,

or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

SEC. 249. Any persons seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has pur-

chased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise required or transferred.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 351

PITTSBURGH TERMINAL REALIZATION CORPORATION, Petitioner,

v.

WILLIAM G. HEINER, Trustee of Pittsburgh Terminal Coal Corporation, Debtor, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW.

No opinion was filed by the United States District Court for the Western District of Pennsylvania (Sitting in Bankruptcy).

The opinion of the United States Court of Appeals for the Third Circuit (R. 65-70) is reported in 183 F. 2d 520.

JURISDICTION.

The jurisdiction requisites are adequately set forth in the Petition.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether a federal bankruptcy court, in a corporate reorganization proceeding, has jurisdiction to protect its orders and decrees, to interpret and administer the Plan of Reorganization, to enforce and carry out such Plan, and to prevent interference with its execution and operation.

STATUTE INVOLVED.

Bankruptcy Act, Chapter X, 52 Stat. 883, 11 U.S.C. Sec. 501 et seq. (Chandler Act).

COUNTER-STATEMENT OF THE CASE.

The Plan of Reorganization (Plan) of Pittsburgh Terminal Coal Corporation (Debtor) duly approved, confirmed and ordered consummated as of April 15, 1945, (Appt. 19a),[1] provided for the liquidation and distribution of the remaining assets of the Debtor within a limited period of time and at limited expense (Appt. 14a-16a) through the instrumentality of Pittsburgh Terminal Realization Corporation (Reorganized Company), a new corporation created under the Plan, the capital stock of which was distributed share for share to the public holders of Preferred Stock of the Debtor entitled to participate under the Plan, (Appt. 5a-7a).

Throughout these proceedings the Preferred Stockholders have been actively represented by the Preferred

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1. The appendixes to the briefs of the appellant and appellee in the Court of Appeals (3 Cir.) are designated as "Appt." and "Appee" respectively.

Stockholders Protective Committee (Protective Committee) with Alexander Guttmann as Chairman. The said Guttmann became and still is President of the Reorganized Company, (Appt. 6a (foot note), 38a).

The plan provided, inter alia, that "the Articles of Incorporation or By-Laws of the Reorganized Company, * * *, shall provide that

(a) it is organized for the purpose of liquidating the remaining assets of the debtor, * * *

(b) the term for which it is to exist is 5 years, which term may be extended for an additional 5 years,

* * * * * * *

(i) directors shall not receive any salary or compensation * * * but each director may be allowed compensation not exceeding $25.00 for attendance at each meeting, plus his traveling disbursements. In no event shall the total compensation paid to officers and directors of the Reorganized Company in any year for services in any capacity exceed $5,000.00. * * *." (Appt. 14a-16a).

The Plan contains the following reservation of jurisdiction:

"The Court shall retain jurisdiction over the assets dealt with in the Plan and over all and any persons to whom such assets may be transferred and over all creditors and stockholders of the Debtor and all parties appearing in the Reorganization Proceedings, for the purpose of carrying out and giving effect to any and all provisions of the Plan and the decree confirming the same." (Appt. 18a).

The Order of Consummation contains the following reservations of jurisdiction:

"8. In addition to the jurisdiction hereinabove reserved by this Court, the Court reserves jurisdiction:

(a) * * * * * * * *

(b) * * * * * * * *

(c) To hear and determine in its discretion, on exparte application, any and all matters with respect to carrying into effect of the Plan and to make from time to time such orders appropriate for enforcing or carrying out the Plan or the provisions of this Order or any Order hereinbefore entered herein, as the Court may at any time deem proper.

(d) Generally to determine any and all matters pertaining to these proceedings or the Plan or to the Reorganized Company and not heretofore or by this Order determined and to make from time to time such further orders as this Court may deem proper in the exercise of the jurisdiction conferred upon it by the provisions of Chapter X of of the Bankruptcy Act;" (Appt. 27a-28a).

In the early fall of 1949 William G. Heiner, Trustee of Debtor, declined to comply with a request of representatives of Alexander Guttmann, President and Chairman as aforesaid, that he, as Trustee, petition the Court for modifications of the Plan whereby the term of existence of the Reorganized Company would be extended and the limitations on the compensation of directors and

salaries to be paid to officers would be altered and eliminated respectively. Thereafter, late in November 1949, the Trustee learned through a notice received by mail and through representatives of the United States Securities and Exchange Commission (S. E. C.) that a special meeting of the stockholders of the Reorganized Company had been called for December 12, 1949, for the purpose of amending the By-Laws so as to extend its term of existence and so as to alter the compensation of directors and entirely eliminate the limitation on salaries to be paid to officers; that for several years Monroe Guttmann, son of Alexander Guttmann, the President and Chairman as aforesaid, had been paid salary of upwards of $12,000.00 per year as "Assistant to the President"; that for several years one Wolfers, son-in-law of the said Alexander Guttmann, had been paid compensation in excess of $5,000.00 a year; that leases and other arrangements had been made permitting the said Monroe Guttmann and Wolfers to use the Reorganized Company's assets in speculative strip mining and other operations; that large sums of money of the Reorganized Company had been expended for extensive improvements to real estate far in excess of any requirements for liquidation; that substantial amounts of the funds of the Reorganized Company had been retained for these and other speculative purposes instead of being distributed to stockholders in accordance with the intent and purpose of the Plan; that said Alexander Guttmann and other members of the Preferred Stockholders Protective Committee, members of their families and business associates had traded extensively in the preferred stock of Debtor and stock of the Reorganized Company and as a result thereof said group (Guttmann Group) presently owned and controlled in excess of two thirds

(⅔) of the stock of the Reorganized Company, (Appt. 44a-45a, Appee. 7a, 33a-35a).

On December 7, 1949, the S. E. C. filed a petition asking for an order authorizing an investigation of the trading activities of members of the Protective Committee, members of their families and business associates, and William G. Heiner, Trustee filed a petition (making the S. E. C.'s petition a part thereof) asking for an order preliminarily (to be dissolved or made permanent after final hearing) enjoining the holding of the special stockholders meeting on December 12th, 1949, or any adjournments thereof for the purposes specified above and authorizing and directing the Trustee to make an investigation of the Reorganized Company and report to the Court thereon for the limited purpose of determining whether or not the terms, provisions, intent and purpose of the Plan have been and are being complied with and carried out (Appt. 37a-47a; Appee. 27a-42a).

On December 9, 1949, the Court entered an order on the S. E. C. petition authorizing an investigation of trading activities as prayed for, which order has not been appealed from. At the same time the Court also entered an order preliminarily enjoining the holding of the special meeting of stockholders of the Reorganized Company above referred to and also authorizing and directing the Trustee to make an investigation for the limited purpose above set forth and report thereon to the Court (Appt. 48a-50a; Appee. 43a-44a). At this hearing counsel for the Reorganized Company stated to the Court:

"The petition asks for preliminary injunction and investigation. We have no objection to the

investigation, so long as it doesn't unreasonably interfere with the activities of the company; and any request the Trustee may have for the books, records, and things in the office will be freely granted. What we object to most vehemently is this request for an injunction as to the stockholders' meeting. * * * (Page 16)". (Appee. 23a.)

On December 21, 1949, the Reorganized Company filed a petition sworn to by Alexander Guttmann, President, praying for modifications of the orders entered December 9, 1949, which if granted would have substantially curtailed the investigation authorized pursuant to the S. E. C.'s petition and would have completely stifled the investigation authorized and directed pursuant to the Trustee's petition (Appee. 2a-3a). A hearing thereon was held on January 5, 1950. The Court reserved decision and declined to stay the investigations pending disposition (Appee. 3a-4a).

On January 9, 1950, an appeal was taken by the Reorganized Company from the order entered December 9, 1949, pursuant to the Trustee's petition. (Order Appealed from—Appt. 48a).

On January 16, 1950, Appellant applied for Supersedeas and stay pending appeal both of which were disallowed by the Court on January 17, 1950. (Appee. 4a).

Since the entry of the December 9, 1949, order the following matters, inter alia, pertinent to the necessity for and propriety of the preliminary injunction and the investigation ordered to determine the question of compliance with or violation of the terms, provisions, intent and purpose of the Plan, have been disclosed through further limited examination of the books and records of the Reorganized Company by the S. E. C. and the

Trustee, viz.; that funds of the Reorganized Company were used to make unsecured loans to Monroe Guttmann and Philip Wolfers, son and son-in-law of Alexander Guttmann, President and Chairman as aforesaid, to enable them to conduct strip mining operations on their own account (Appee. 47a); that 1940 acres of undeveloped coal lands owned by the Reorganized Company and carried on its books at upwards of $100.00 per acre were sold to four dominant stockholders including Alexander Guttmann, President and Chairman as aforesaid, for $10.00 per acre payable $1.00 in cash and $9.00 by a mortgage at 3% due December 24, 1951 and that the interest due thereon on December 24, 1947 was still unpaid on December 24, 1948, and no action taken to collect (Appee. 49a-50a); that $672.00 of the funds of the Reorganized Company were used to reimburse Alexander Guttmann, President, for expenses incurred prior to the confirmation of the Plan (Appee. 51a); that there was a scheme or plan devised to circumvent the Bankruptcy Law and to use upwards of $35,000.00 of the funds of the Reorganized Company for payment to Alexander Guttmann, President, as compensation for his services and expenses as Chairman of the Protective Committee; that the proposed amendment of the By-Laws by vote of the stockholders at the meeting called for December 12, 1949, so as to eliminate the limitation on salaries to officers (which was preliminarily enjoined by the order appealed from) was intended to facilitate the foregoing payment to Alexander Guttmann without the knowledge, consent and approval of the Court. (Appee. 56a-61a).

On July 17, 1950 the United States Court of Appeals for the Third Circuit entered its judgment affirming the

order entered on December 9, 1949, by the United States District Court for the Western District of Pennsylvania. (R. 63). The said Court's opinion is set forth on pages 65-70 of the record and is reported in 183 F. 2d 520.

Thereafter Pittsburgh Terminal Realization Corporation (Reorganized Company and appellant in the Court of Appeals) filed in the United States Supreme Court its Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ARGUMENT.

I.

We respectfully submit that Petitioner's "Specification of Errors" and "Reasons for Granting the Writ" are without merit. Both are predicated upon a plain misapprehension of the jurisdictional basis for the Bankruptcy Court's order involved herein and the basis of the Court of Appeals' judgment affirming said order.

An examination of the Trustee's Petition and the order of Court entered thereon (Appt. 37a-50a) show very clearly that the matters at issue are concerned only with the enforcement and carrying out of the Plan and involve the interpretation and administration of the Plan. Neither the Bankruptcy Court nor the Respondent is attempting to "inter-meddle" in or supervise generally the internal affairs and business conduct of the Petitioner not in any way connected with the administration, enforcement and carrying out of the Plan. Throughout these proceedings we have freely recognized that it is well settled law that this cannot be done; that the Court cannot by the device of a reserva-

tion of jurisdiction indefinitely keep a Reorganized Company in bondage and under tutelage, act as a wet-nurse to it and supervise its affairs and conduct which have no connection with the plan of reorganization.

It is equally well settled law, however, that the Bankruptcy Court may properly reserve jurisdiction to protect its decrees and orders, to interpret and administer the plan of reorganization, to enforce and carry out such plan and to prevent interference with its execution and operation.

Thus:

In *In re Broadway Hotel Co.*, 131 F. 2d 120 (7 Cir. —1942) (Cert. Denied sub nom. *Thomas v. Rossiter*, 318 U.S. 766) it was contended that contempt could not be predicated upon an order of the Bankruptcy Reorganization Court enjoining acts which would interfere with the operation of the Plan of Reorganization because the Court was without jurisdiction to enter such injunction. In affirming the contempt the Court said:

> "Appellant persists in the argument that when a debtor corporation has been reorganized, the purpose of the law has been attained and the jurisdiction of the bankruptcy court ends. Assuming this contention to be correct as a general proposition, its application is dependent upon the provisions of the plan as confirmed and reservations, not inconsistent therewith, contained in the order of confirmation. As our former opinions disclose, the proposed plan of reorganization and the reservations contained in the order of confirmation were such as to retain in the Court jurisdiction to enter the injunction orders * * * it must follow, so we think, that the court

has the authority to enjoin any act inconsistent with or which will interere with the operation or execution of the plan as confirmed."

To like effect are:

Clinton Trust Co. v. John H. Elliott Leather Co., 132 F. 2d 299 (2 Cir. 1942).

Mar-Tex Realization Corp. v. Wolfson, 145 F. 2d 360 (2 Cir. 1944).

North American Car Corp. v. Peerless Weighing & Vending Machine Corp., 143 F. 2d 938 (2 Cir. 1944).

In re New York, New Haven & Hartford Ry. Co., 169 F. 2d 337 (2 Cir. 1948).

In *Shores, et al. v. Hendy Realization Co.,* 133 F. 2d 738 (9 Cir. 1943) an action instituted in the state court to determine whether a distribution of stock to managers of the reorganized company was in accordance with the Plan of Reorganization was enjoined by the Bankruptcy Court. The Court said:

"* * * Appellants contend that the effect of the decree was to close the case and to terminate jurisdiction, except as regards attacks upon or efforts to obstruct or interfere with the plan as confirmed and approved. * * * While no case has been cited determinative of the precise point raised, several dealing with aspects of the jurisdictional problem have arisen in the 7th Circuit. (cases cited.) Some of these decisions contain broad language indicative of the view that matters not specifically reserved cannot be considered after the final decree. The situation in In Re. Hermitage Building Corp. (100 F. 2d 597) supra is analogous to the one before us; and it was there held that

the bankruptcy court had continuing jurisdiction to see to it that the reorganization plan was complied with, despite the fact that the final decree had dismissed the debtor and stated that the plan had been carried out. * * * The question attempted to be litigated in the state court was whether the directors, in making the stock distributions to the management, had acted in conformity with the approved plan, or, to put it in a negative way, whether they were not undertaking to do something which the Court had decreed should not be done. *The question was one of interpretation. It involved the administration of the plan itself.* The Court best equipped as well as the one properly entitled to resolve disputes of that kind was the Court in which the proceeding had been conducted. *As to fundamental questions of interpretation and administration such as these we think the jurisdiction of the bankruptcy Court continues whether future consideration of them was expressly reserved or not.* Otherwise, interpretations at war with each other no less than with the decree itself may well result. Consult Gerdes, Corporate Reorganizations, Vol. 3, Paragraph 1147, page 1828." (Emphasis supplied.)

We respectfully submit that the law enunciated in the foregoing cases is the rule of law applicable to and decisive of the case at bar and we further submit that an examination of the opinion of the Court of Appeals (written by Judge McLaughlin) when read in full context shows clearly that this rule of law as to jurisdiction was the basis of its judgment affirming the Bankruptcy Court's order.

II.

There is not the slightest conflict between the decision of the Court of Appeals in this case and the Agawam case in the First Circuit and the Reese case in the Second Circuit. Both of these cases involved *rehabilitated* companies with no limitations imposed on them by the plans of reorganization as distinguished from a *liquidating* company with limitations imposed by the plan as is the Petitioner. Furthermore, the questions involved had no connection with the plans of reorganization and in no way involved the administration or interpretation or enforcement of the plans. These cases are typical of the well settled rule of law that the Bankruptcy Court cannot by the device of a reservation of jurisdiction indefinitely keep a reorganized company in bondage and supervise the affairs and conduct which have no connection with the Plan of Reorganization.

Furthermore, the Second Circuit has on numerous occasions laid down the rule of law that the Bankruptcy Court may properly reserve jurisdiction to protect its decrees and orders, to interpret and administer the Plan of Reorganization, to enforce and carry out such Plan and to prevent interference with its execution and operation. (See cases cited supra, p. 11 this brief.

In a comparatively recent case in the Second Circuit, viz.: *In Re New York, New Haven & Hartford Ry. Co.*, 169 F. 2d 337 (2 Cir., 1948) the distinction between the principles of jurisdiction contended for as applicable to the case at bar by Petitioner and the cases cited by Petitioner in support thereof and the principles of jurisdiction which Respondent contends are applicable and

which are exemplified by the cases above cited is quite clearly recognized and set forth. In that case the Court says:

> "The Appellant's third assignment of error is grounded on cases under comparable provisions of Chapter X of the Bankruptcy Act, 11 U.S.C.A., Paragraph 501 et seq., in which this Court has held that in confirming a plan of reorganization the Court 'may not, through the device of retaining jurisdiction keep a debtor in tutelage and burden the Court with future supervision of the reorganized estate.' Towers Hotel Corp. v. Lafayette National Bank, 2 Cir., 148 F. 2d 145, 148, and cases there cited. *But, as that decision recognizes, jurisdiction may be retained by the court 'in order to protect its decree, to prevent interference with the execution of the plan and to aid otherwise in its operation.'* The case at bar falls within the stated exceptions." (Emphasis supplied.)

It would seem too clear for argument that there is no sound reason to grant Certiorari in this case on the ground of conflict of decisions. There is no conflict.

III.

Petitioner's argument that it is subject to and governed solely by the laws of Pennsylvania and that therefore it can eleminate the restrictions and limitations placed upon it by the provisions of the Plan of Reorganization through the simple procedure of amending its by-laws is, we submit, specious and unsound.

The Plan provided specifically that the charter or by-laws of Petitioner created pursuant to the Plan, (*not*

merely the "initial" by-laws as stated by Petitioner on page 4 of the Petition for Certiorari), were to provide that the purpose of Petitioner is to liquidate the remaining assets of the debtor in an orderly manner, at fair and reasonable prices, without sacrificing said assets, that its term of existence is 5 years which might be extended for 5 years more, and that compensation paid to officers in any year shall not exceed $5,000.00 (Appt. 14a). Obviously, these limitations were placed in the Plan to minimize the temptation, danger and opportunity of prolonging the liquidation and exploiting the Reorganized Company and its assets for the benefit of dominant stockholders.[2]

We submit that these provisions of the Plan became and are as much a part of the fundamental or organic law of Petitioner as is its charter. If the by-laws are amended so as to eliminate these restrictions, the Plan would obviously be departed from and defeated to that extent. The fundamental or organic law of Petitioner would be violated. The power or right to amend its by-laws cannot be exercised contrary to its organic law.

Petitioner's argument is tantamount to saying that immediately after the Order of Consummation was made on March 23, 1945, and by virtue of the provision for amending the By-Laws, the Reorganized Company through the device of amending the by-laws, could amend the Plan. Thus, on March 24, 1945, the stockholders of the Reorganized Company could amend the by-laws to provide any term of existence they desired or to provide salaries to officers not in excess of any

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2. An attempt to eliminate these restrictions was refused by the Bankruptcy Court. (Appee 24a-26a)

amount or figure they desired. Thus Petitioner's argument is that the Reorganized Company immediately after the Order of Consummation was entered was *free to amend the by-laws to amend the Plan,* and thus to nullify, in effect, material provisions of the Plan. We submit that the mere statement of such a position contains its own refutation.

IV.

Petitioner's argument that Respondent had no power or authority to present his petition for the order appealed from and affirmed by the Court of Appeals is clearly erroneous and without merit.

Until final decree and discharge of the Trustee has been entered this bankrupt estate is still in process of administration and the Trustee cannot be "functus officio." *Matter of Paramount Publix Corp.,* 82 F. 2d 730 (2 Cir. 1936); *Matter of Mallow Hotel Corp.,* 29 F. Supp. 931 (M. D. Pa., 1939); *Knight v. Wertheim & Co.,* 158 F. 2d 838 (2 Cir. 1946).

Respondent respectfully submits to your Honorable Court that his petition (Appt. 27a-47a) suggesting and praying for the order appealed from was *not* "officious intermeddling". Nowhere in his petition does the Respondent claim to be acting in behalf of stockholders. He does point out to the Court the fact that public holders of stock of the Reorganized Company (Petitioner) may be injured by the acts alleged in the petition. We think, however, that a Trustee in Bankruptcy has a clear duty to consider and protect the interest of all persons in the bankrupt estate, including creditors, stockholders, reorganized company and anyone else hav-

ing an interest in and affected by the proceedings. Respondent in presenting his petition was doing what he conceived to be, and still believes to have been, his plain duty to the Bankruptcy Court. Your Respondent believes and contends that it was his clear duty, as the trusted officer of the Court, to disclose to the Court the matters which had come to his attention. Perhaps the document through which he did this might better have been designated as "Interim Report and Recommendations" or "Petition for Instruction" but by whatever name it is designated the purpose was to bring to the Court's attention matters intimately pertinent to the administration of the bankrupt estate. The Court was administering this estate and the Trustee is merely the agent of the Court to assist the Court in the performance of its duties. Can it possibly be that after the order of consummation, but before discharge, the Trustee owes no duty to the Court except to file his account? We think that such a contention is preposterous.

Let us put it in another way. Before the proceedings can be closed by final decree and the Trustee discharged he must make to the Court a report and accounting of his trusteeship. He must state to the Court that Plan of Reorganization has been consummated, that the Plan is in operation, that the administration of the trust estate has been completed, that there is nothing further requiring the Court's attention, and that the proceedings may properly be closed up and terminated. How could any honest trustee do this if matters had come to his attention giving reasonable grounds to believe that the Bankruptcy Act, the Plan and the decrees of the Court were being violated, circumvented and flaunted? We submit that the only answer is—He could not do it.

There can be no question about his duty. He must inform the Court. Since he must inform the Court, it is also obviously his duty to do so promptly and not wait until the time of final decree; otherwise he would be clearly open to a charge of conniving with the wrongdoers and would, we submit, be guilty of a gross breach of duty warranting the most serious condemnation of the Court. This is exactly what Mr. Heiner, the Trustee, did and for doing so he is characterized by the Petitioner as an "officious intermeddler."

Furthermore this is exactly what Petitioner's attorney told Alexander Guttmann that the trustee would be duty bound to do. Petitioner's and his attorney's conception of the Trustees' duty to the Court have certainly undergone an amazing change since November 2, 1949, as is clearly shown by the following excerpt from the minutes of the meeting of the directors of the Reorganized Company held on that date:—

> "Mr Guttmann advised the Board that he had retained Mr. Leonard Levenson to investigate the means by which the present limitation on compensation payable to officers could be eliminated * * *. He stated that it was Mr. Levenson's considered opinion that the by-laws covering the matter of compensation to officers and directors and the limitation thereon could be amended by a vote of two-thirds of the stockholders without seeking the approval of the Bankruptcy Court. He stated that Mr. Levenson had advised that the Company notify the Trustee, Mr. William G. Heiner, in writing of the proposed amendment to the by-laws and *that Mr. Heiner, in his capacity as Trustee, is an officer of the Court and that if he found any objection to*

this procedure, that he would be duty bound to take some action to stop the proposed change in the said by-laws; that if he did not do so, it could be construed that the Court confirmed the opinion that no special hearing or ruling of the Court would be needed with respect to such a change in the by-laws." (Emphasis added). (Appee. 45a-46a).

CONCLUSION.

Since the Court of Appeals has correctly held that the Bankruptcy Court had jurisdiction to make the order of December 9, 1949, enjoining preliminarily the holding of a special meeting of the stockholders of Pittsburgh Terminal Realization Corporation (Petitioner herein) for the purpose of eliminating from its by-laws certain restrictions and limitations placed therein by and pursuant to the Plan of Reorganization and authorizing and directing William G. Heiner, Trustee of Pittsburgh Terminal Coal Corporation, Debtor, (Respondent herein), to investigate the business and affairs of the Reorganized Company for the limited purpose specified in said order and since this case does not involve a conflict of decisions among the circuits or any controversial question of general importance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES I. MARSH,
Attorney for Respondent.

Office-Supreme Court, U. S.
FILED
NOV 29 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

NO. 351

PITTSBURGH TERMINAL REALIZATION CORPORATION, Petitioner,

v.

WILLIAM G. HEINER, Trustee of Pittsburgh Terminal Coal Corporation, Debtor, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER.

1. Petitioner accepts the challenge of the Securities and Exchange Commission on the issue of law.

The Securities and Exchange Commission, in its attempt to refute petitioner's argument that the reorganization court lacked jurisdiction to prevent amendment of its by-laws by enjoining the stockholders meeting called for that purpose, makes the following statement, apparently intended as *reductio ad absurdum* (SEC Br. 11-12):

> "As well might the petitioner argue that the reorganization court could not prevent removal of the provision of the charter for periodic reports to

security holders, a provision made mandatory by Section 216(12)(b)(2) of the Act."

Although the matter of periodic reports is not involved in the instant case, petitioner not only might but does so argue, and joins issue with the Securities and Exchange Commission on the question of the correctness of that argument. Furthermore, petitioner would willingly submit this case on that question as on a question certified, because it is, in principle, the basic question here involved.

Section 216(12)(b)(2) provides that:

> "A plan of reorganization * * * shall provide for the inclusion in the charter of the debtor, or any corporation organized or to be organized for the purpose of carrying out the plan, of * * * provisions with respect to the making, not less than once annually, of periodic reports to security holders * * *"

Thus, a plan which fails to provide for the inclusion of such provision for periodic reports in the charter cannot be confirmed by the court as being in conformity with the law requiring it; and a charter which fails to include such provisions cannot be approved by the court as being in conformity with the plan requiring it. But, when a plan is confirmed which contains the required provision, the Act is satisfied; and, when a charter is issued which contains the required provision, the plan is consummated. If, thereafter—say twenty years later—the stockholders of the successor corporation, unanimously or by appropriate majority, decided to dispense with periodic reports, for economy or other reasons, and took due corporate action in conformity with the law of the

state of incorporation to amend the charter to eliminate the provisions for periodic reports, would such action be enjoinable by the federal court which supervised the reorganization of the predecessor debtor corporation? The Securities and Exchange Commission so contends. This contention is tantamount to a construction of Section 216(12)(b)(2) so as to read:

> "The corporation shall make, not less than once annually, periodic reports. * * *"

Such a construction would be clearly repugnant to the Tenth Amendment of the Constitution as an attempt by the federal government to infringe on state sovereignty by regulating the internal affairs of state corporations, and this the framers of the Act were careful to avoid. Analysis of H.R. 12889, 74th Cong. 2d. Sess. (1936) 80.

Thus the issue, which is so squarely drawn between petitioner and respondents, is an issue which goes to the very basic and fundamental concept of Chapter X. A resolution of this issue by decision of the Supreme Court appears to be imperative.

2. Respondents' "facts" are neither relevant nor true.

Respondents, in their briefs in opposition, persist in their attempts to evade, confuse, and obscure the basic question at issue—that of the jurisdiction of the reorganization court—by citing so-called "facts"[1] to justify the exercise of jurisdiction by the court. But the

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[1] Most of respondents' "facts" were introduced into the record by *ex parte* affidavits "on information and belief" filed without notice *after* the order appealed from had been entered and *after* petitioner had perfected its appeal therefrom to the Court of Appeals. (Appee. 1a)

existence of facts which would justify the exercise of jurisdiction by a court possessing jurisdiction cannot create jurisdiction in a court which lacks it. Thus, because a federal court lacks jurisdiction in divorce, it cannot enter a decree in divorce, no matter how harrowing are the "facts" presented to it of indignities and abuse heaped on the innocent and injured spouse, which would justify the entry of a decree by a court possessing jurisdiction.

The "facts" cited by respondents to justify the exercise of a non-existent jurisdiction are not only irrelevant to the issue but they are not even facts. The so-called "facts" are a conglomeration of misrepresentations, distortions, half-truths, and innuendos calculated to present a deliberately false picture of the situation.

Following is an example of how respondents have presented the "facts" to this Court:

In his brief in opposition, Heiner repeats the following "fact" presented to the courts below (Heiner Br. 8):

> "that 1940 acres of undeveloped coal lands owned by the Reorganized Company and carried on its books at upwards of $100.00 per acre, were sold to four dominant stockholders including Alexander Guttmann, President and Chairman as aforesaid, for $10.00 per acre * * *",

carrying the obvious implication that the four stockholders had made secret profits at the expense of the corporation by purchasing from the corporation a valuable asset for one-tenth its value. The truth, as Heiner well knows and knew it to be, is that the purchase of the asset by the four stockholders was designed to benefit

the corporation, and did benefit it to the extent of more than $45,000, by the tax advantage resulting from the sale of a high cost asset at a low price; that the asset at the time of its sale to the stockholders was not, and has not since been, worth its selling price; that it was sold to the stockholders only after attempts to sell it to others by newspaper advertising and direct solicitation had failed; and that the circumstances of the sale were published in the 1946 annual report of the corporation sent to every stockholder of record. As far back as 1944, Heiner listed this same asset among the assets of the estate in the plan of reorganization, but assigned it no value, indicating in a footnote (Appt. 11a) that its value, if any, was doubtful.

Another "fact" cited by Heiner, which is false both in statement and implication, is the following (Heiner Br. 5):

> "that for several years Monroe Guttmann, son of Alexander Guttmann, the President and Chairman as aforesaid, had been paid salary of upwards of $12,000.00 per year as 'Assistant to the President';".

The direct misstatement lies in the fact, as Heiner knows and knew, that Monroe Guttmann never received salary of *upwards* of $12,000, and that he received $12,000 in only one year, 1948, and not *for several years*. His average annual salary during the five years he has been employed by petitioner has been $8200. But more important, the "fact" contains the intended false implication that Alexander Guttmann secretly padded the payroll of the corporation by adding his son thereto with a fictitious title. The actual fact, as respondents well know and knew, is that Monroe Guttmann, a certified

public accountant, has been rendering valuable services to the corporation as manager of the Pittsburgh office; that his employment, title, relationship to Alexander Guttmann, and salary were published in the annual report to the stockholders for 1945 and for every year since; and that Heiner and representatives of the Securities and Exchange Commission, during the years 1945 to 1949 inclusive, had numerous business contacts with Monroe Guttmann at the Pittsburgh office of the corporation and were aware of the nature and extent of the services he was rendering.

The foregoing are but instances to illustrate the manner in which respondents have presented the "facts". The true nature of every one of their "facts" could, if relevance required and space permitted, be similarly demonstrated by petitioner.

3. The Securities and Exchange Commission's brief in opposition misrepresents the record.

The Securities and Exchange Commission has misrepresented the record of the reorganization proceeding in an apparent attempt to bolster its untenable legal position. Its "Statement" contains the following (SEC Br. 4):

> "In its order of March 23, 1945, for consummation of the plan, the court approved the *proposed* certificate of incorporation and by-laws of the Realization Corporation. * * * The petitioner corporation was *then* formed * * *." (Emphasis added)

The certificate of incorporation, which the court approved in its order of consummation, made on March 23, 1945, was not a *proposed* certificate, but was one which

had been *theretofore* duly issued by the Commonwealth of Pennsylvania on December 28, 1944, and the order of March 23, 1945, so expressly states. (Appt. 19a - 20a) Similarly, the by-laws approved in the order of consummation were not *proposed* by-laws but were by-laws which had been *theretofore* duly adopted. And the petitioner corporation was not *then* formed; i.e., after entry of the order of consummation, but had been formed and in existence since December 28, 1944, the date that the certificate of incorporation issued.[2]

Thus, what actually occurred was this: On December 19, 1944, the court confirmed the plan of reorganization, which provided that the articles of incorporation and by-laws of the successor corporation should contain certain restrictive provisions. On December 28, 1944, the successor corporation was duly organized under the provisions of the Pennsylvania Business Corporation Law with articles of incorporation containing the restrictive provisions required by the plan, and by-laws were duly adopted likewise containing the required restrictive provisions. *Subsequently,* these articles and by-laws were submitted to the court for approval, and the court, on March 23, 1945, declared (Appt. 20a) that the articles and by-laws which *had been* adopted by the successor corporation were "in substantial compliance with the terms and provisions of the Plan". Thus, the portion of the plan requiring restrictions in the articles and by-laws of the successor corporation had been fully complied with and was, therefore, fully consummated. Had the successor corporation failed to include the re-

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[2] "Upon the issuance of the certificate of incorporation by the Department of State, the corporate existence shall begin, ..." Pa. Act of May 5, 1933, P. L. 364, Sec. 207; 15 Purdon Stat. Sec. 2852-207.

strictions in its articles and by-laws, then the court could have exercised its jurisdiction to protect its decree and enforce the plan, by refusing to approve the articles and by-laws as submitted and by directing that the proper provisions be included; for it is settled law that the reorganization court has jurisdiction after confirmation of the plan to enforce consummation. Between December 19, 1944, when the court ordered the plan confirmed, and March 23, 1945, when the court declared the plan consummated, the articles and by-laws of petitioner were under the court's jurisdiction. But after the latter date, the court having declared the provisions of the plan regarding the articles and by-laws of petitioner consummated, petitioner's articles and by-laws became subject only to its stockholders acting in conformity with law.

What the Securities and Exchange Commission apparently intended to accomplish by deliberately, and in the teeth of the record, adding the word "proposed", was to change the order of March 23, 1945, from an order approving the articles and by-laws which *had been* adopted and declaring the plan thereby consummated, to an order approving *proposed* articles and by-laws and directing them *to be* adopted, thus changing the order from an order of consummation, as it was plainly labelled, (Appt. 1a) to an order on confirmation.[3]

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[3] The actual order of confirmation had been entered on December 19, 1944. (Appt. 1a)

4. Petitioner's stockholders need "safeguards" to protect them from the trustee and not from their management.

In its argument maintaining that justice requires the exercise of jurisdiction by the bankruptcy court in this case, the Securities and Exchange Commission contends that (SEC Br. 11):

> "Otherwise, an entrenched management interested primarily in hanging on to their jobs may disregard the right of the minority to an early liquidation and prompt distribution of the proceeds, and may find it to their advantage to use the assets for speculative new ventures instead of adhering to a speedy disposal program."

Such is not the case here, as respondents well know, because over two-thirds of the so-called "minority" stockholders, not members of the so-called "Guttmann group" voted in favor of adopting the enjoined by-laws and voted to re-elect the same management after Heiner presented his "facts" to the court, and not a single stockholder has joined either Heiner or the Securities and Exchange Commission in the year that has passed since their attack on the management of the corporation. But assuming, *arguendo*, that such were the case, is not the danger of an entrenched management acting *ultra vires* present in every corporation? The laws and courts of Pennsylvania provide just as full relief and redress and "safeguards" to minority stockholders of a corporation which happens to be successor to a debtor corporation as to minority stockholders of any other corporation. If the "minority" stockholders of petitioner require the services of a trustee to protect them,

then so do the "minority" stockholders of every corporation.

But what "safeguards" do the stockholders, both majority and minority, of a successor corporation have against litigation and investigation instituted at their expense, but without request of any of them, by a reorganization trustee interested primarily in hanging on to *his* job?

5. Whose interest was the trustee serving in initiating this litigation?

The trustee, in answer to petitioner's contention that the trustee's intervention is unsolicited, states the following: (Heiner Br. 16)

> "Nowhere in his petition does the Respondent claim to be acting in behalf of the stockholders. * * * We think, however, that a Trustee in Bankruptcy has a clear duty to consider and protect the interest of all persons in the bankrupt estate, including creditors, stockholders, reorganized company and anyone else having an interest in and affected by the proceedings."

In applying this all-inclusive statement of the protective duties of a trustee to the instant case, we find that there are no creditors, they having been paid in full in cash; that Heiner expressly disclaims acting in behalf of stockholders; and that the reorganized company is his adversary. In whose behalf, then, *is* Heiner acting and to whom does he refer by "anyone else having an interest" in the proceedings? If he is thus obliquely referring to himself, petitioner submits that the interest of a trustee in perpetuating himself in an office he

has been enjoying for ten years is understandable, but not recognizable in law as an interest justifying the initiating of litigation.

But the interest of Heiner in initiating this litigation is apparently not so simple as that. Despite the fact that the court had entered the order of confirmation in December, 1944, the order of consummation in March, 1945, and the order granting *final* fees and allowances in the proceeding in September, 1945, Heiner, when he presented his petition for injunction and investigation more than four years later, in December, 1949, had not yet filed his account, nor had he paid over to petitioner the balance of funds remaining, as he was required to do by the plan (Appt. 9a) and by the order of March 23, 1945. (Appt. 24a) Petitioner is the beneficiary of that balance of funds which Heiner holds as fiduciary. By his attempt to prevent petitioner from taking action to extend its corporate existence, Heiner apparently sought to eliminate, by terminating its existence, the sole party in interest to object to his account when filed, and, failing that, Heiner apparently sought, by his "investigation" of petitioner and its management, to so harass and intimidate them that no objections to his account would be filed.[4] Here is the strange spectacle, indeed, of the fiduciary investigating the beneficiary before whom he must account.

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[4] On July 14, 1950, Heiner filed his account covering the period from March 13, 1942 to June 30, 1950. On September 29, 1950, petitioner filed its objections thereto, itemizing 175 items of exception and demanding that Heiner be surcharged in the sum of $462,293.24.

6. Petitioner's direct and straightforward procedure is denounced by respondents as "circumvention" and "evasion".

A mere examination of respondents' contention that petitioner's procedure to amend its by-laws by corporate action was an attempt to avoid petitioning the court for alteration of the plan is sufficient to reveal its absurdity. If the proposed amendments to the by-laws had been presented to the court as proposed alterations of the plan, the court would have, under Sec. 222 of the Bankruptcy Act, submitted the so-called alterations to the stockholders,[5] the sole parties in interest and the only parties that voted on the acceptance of the plan itself. But Sec. 222, in conjunction with Sec. 179, provides for approval of alterations by mere majority vote of stockholders, and Sec. 223 provides that failure to file written rejection of alterations shall be deemed acceptance. Under the procedure petitioner actually followed in accordance with its by-laws, the adoption of the amendments to the by-laws required an *affirmative* two-thirds vote of the *same* stockholders. Thus, petitioner is accused by respondents of "evading" a procedure requiring only non-rejection by a mere majority of its stockholders for approval, by adopting a procedure requiring the affirmative vote of two-thirds of its stockholders for approval.

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[5] Cf. *Knight v. Wertheim*, 158 F. 2d 838.

7. The disposition of petitioner's property is a matter for its stockholders and not for respondents.

Respondents' argument that the proposed amendments would "defeat" the plan likewise falls upon inspection. Respondents complain that petitioner may not liquidate fast enough, but they fail to make clear for whom the liquidation would not be fast enough. All allowed creditors of the debtor have been paid in full, and petitioner has but a single class of stockholders. If petitioner, who has clear legal title to its property, with the approval of its stockholders, who are the equitable owners of the property, should choose to liquidate that property more slowly and thereby obtain higher prices, what would be "defeated"? Surely, the stockholders of petitioner have the right, by appropriate corporate action, to dispose of their corporation's property in accordance with their judgment, without having to satisfy the Securities and Exchange Commission and the reorganization trustee as to the correctness of their judgment.

Respectfully submitted,

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APPENDIX.

BANKRUPTCY ACT, CHAPTER X, 52 Stat. 840, 883 (11 U.S.C. 601, *et seq.*):

Sec. 179. After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 203 of this Act, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation.

* * * * * * *

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance

or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

Sec. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.